Go graphic in mediation, not just in trial

At best, you will likely increase the settlement value; at worst, you're really *ready for trial*

By Morgan C. Smith

The advent of ADR in the late 1980s and early 1990s created a sea change in the practice of civil litigation. Forty years ago, the archetypal civil litigation attorney had a very different practice than today. Discovery was almost nonexistent back then, and attorneys often would figure out a case and find the evidence in the middle of trial. Civil litigators like Melvin Belli, my old boss Stan Bell and others of that era had a well-earned reputation as gunslingers who needed little preparation before appearing in court.

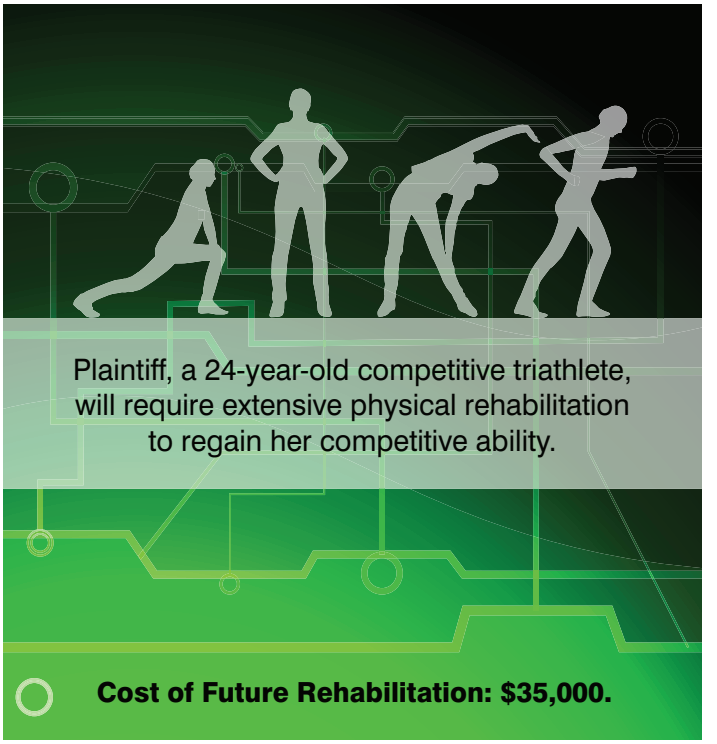
But as cases increasingly headed to mediation, and attorneys became better equipped with an arsenal of tools to present their arguments, the old-school style went the way of the three-martini lunch. The case that gets tried now is the exception, and the case that settles at mediation now is the rule.

A 2005 study by the National Center for State Courts concluded that 97 percent of civil cases are settled or dismissed without a trial.[1] Class actions take this trend to the extreme; a 2009 Administrative Office of the Court report found that only 0.7 percent of class actions filed in California result in trials.[2]

What does all this mean? That mediation *is* trial, and you should prepare for mediation as you would for trial. While the atmosphere of mediation invites informality, as both sides talk over breakfast treats provided by the mediator, neither side can forget that the goal of mediation is to obtain the highest amount for settlement from the plaintiff's perspective and the lowest amount from the perspective of the defense, just as if the case were being presented to a jury.

Prepare for mediation like trial

The use of visual presentations in trial continues to increase on a yearly basis as juries become more accustomed to – and demanding of – visuals in a case for easier understanding. [3] (These often are multimedia presentations that can incorporate a mix of audio and interactive technology along with video and other images, but for simplicity sake I'll refer to "visuals" and "graphics" synonymously.) Attorneys who fail to incorporate visuals when they make their case risk losing the interest of a jury.



But while graphics have become quite common in court, their use remains under-utilized in the mediation format. This should not be the case when so many ways exist to increase the power of your case in mediation through the use of graphics, if you approach mediation like the trial that it really is.

The benefit of using visuals in mediation is really threefold:

(1) there are no rules of evidence at mediation, so you are free to present anything you believe is relevant to the case;

(2) you can use your opponent's own words and documents to prove your case in the most powerful but non-adversarial way possible; and

(3) you can create a mediation presentation that can be saved digitally and

sent to any decision-maker who is unable to attend the mediation, which increases the power and reach of your mediation beyond the day itself.

Visually presenting a case

There is really nothing very complicated about presenting a case visually, whether in mediation or at trial. All you do is simplify every complicated concept into easily understood graphics that do not rely on words to convey the gist of the case. See, easy! In truth, this obviously can be difficult, but knowing a few simple tricks that anyone can do will increase the presentation value of a case.

First, plaintiff attorneys must never forget they are a storyteller whose job it is to create the narrative of the case. This involves more than simply laying out a legal claim and saying the defendant is responsible. It involves creating a full story that is engaging and persuasive for your case. Using well-made graphics, such as storyboards and/or animations, as a starting point or backdrop to presenting your case goes a long way toward creating that narrative.

For personal injury, wrongful death and any products liability case, the facts almost always are far better understood visually than in written format. For a simple personal injury case with admitted (or barely contested) liability, you may only need a good chronology of events[4] and treatment, along with graphics of the body parts injured. If you have X-rays or MRIs, they can be helpful to include, but using graphic software to highlight the actual injury – or, better yet, creating a medical illustration of the injury – is more impressive and persuasive.

For a more complex case involving disputed liability, graphics often become even more important to show geographical relationships, equipment, products, and claims of fault or comparative fault. When well done, all this work shows that you are well prepared and ready for trial, you believe in your case, and you could present it to a jury if the case does not settle. These are the kinds of things that make your opposing counsel get that worried feeling about a case, which in turn leads to bigger settlements for plaintiffs who are well prepared, or lower settlements for defendants who are well prepared.

PowerPoint™

Before any attorney decides how to use graphics at trial, he or she should consider how to present them at the mediation. The most versatile manner is with a laptop projector, where anything you can put on your computer can be shown on the screen. This opens the door to PowerPoint (or Keynote for Mac), animations, graphics, timelines and anything else a computer can do.

With a well-done PowerPoint, you can import all the documents of the case and zoom in on the key points of the documents. This format allows for setting the scene for the case, identifying all the players, and carefully going through every piece of evidence.

The rule to follow with any PowerPoint is to keep the words to an absolute minimum, and use images as much as possible. No one wants to hear an attorney reading the words that are written on a screen.

PowerPoints should be graphic guides for discussion of the case, with a minimum amount of text to identify what the viewer is looking at.

Animations and simulations

There is no better way to present a case of personal injury, wrongful death, construction defect or product damage than through an animation that re-creates the incident and demonstrates theories of liability. A whole incident can be boiled down to 30 seconds of powerful video that visually proves a case.

Given the lack of rules of evidence in mediation, you also have free rein to create an animation or simulation that may take two to three experts to provide foundation for use at trial.

At mediation you can get all the bang for the buck in terms of the impact on the opposing side without worrying about admissibility issues. If the case does not settle, you still have powerful demonstrative evidence that your experts can provide foundation for admission at the trial itself.

Videotaped deposition

A videotaped deposition of an opponent or the opponent's experts can really be the gift that keeps on giving, both at mediation and trial. Video editing software that is part of TrialDirector, or software that sometimes comes free with the video transcript from the court reporter's office, can enable you to choose key deposition sections and admissions clips that can be exported to PowerPoint for playing at mediation.

There is nothing more powerful than using the words of the opposing side to prove your case. Or better yet, have a split screen where the witness first makes one claim, and then later in the deposition says the exact opposite both side by side with the question that appears at the end of the slide asking which witness is to be believed. Even without a key moment like that, any case will have numerous powerful admissions in a deposition that can be artfully woven together into a narrative that fits your case.

Day-in-the-life video

Many attorneys think of "day-in-the-life" videos only in terms of using them at trial, which may be one of the least effective places to use a day-in-the-life. Due to Evidence Code section 352 prejudice issues, hearsay issues and other foundation issues, what you can play in court is generally strictly limited to a visual presentation simply showing a plaintiff in daily activities, not including interviews or music.

However, since the rules of evidence do not apply in mediation, a creative mind is free to expand the presentation to include things like interviews with family members and music that bring the person's injuries or death to light in a way that no paper presentation ever could. Well-done interviews of people talking about what a life-changing event the incident was to the plaintiff, or the loss of

comfort, care and companionship of a loved one who has died, are extremely moving. While these interviews would not be admissible in court, you can tell the opposing counsel that each and every witness will be called at trial to testify in the same manner.

Video briefs

If you have created a PowerPoint and day-in-the-life as indicated above, you can create a "video brief" of the case by simply exporting the PowerPoint or Keynote presentation into a movie format that retains all the animations and transitions. This preserves the presentation in a format that can be shared with other decision-makers.

On the more complicated end, a video brief can involve all aspects of the case, such as interviews of the family members weaved into animations that re-create the incident, interviews with expert witnesses, discussions of liability, statutes, jury instructions, or anything else relevant to the case. You are only limited by your creativity and time. While some of these graphic elements would not be admissible at trial, the bulk of the work can be reformatted to work in an opening or closing argument at trial if necessary.

There is never a downside to preparing a "video brief" for a case since if the case does settle, the cost of the video will likely pay for itself in increased settlement. If the case does not settle, you're that much more ready for trial.

The brief

While you may shy away from the more technology-intensive suggestions above, there is a great deal that can be done with a brief to increase its impact on the opposing counsel and decision-makers. In the first place, use as many graphics as you can to prove your damages and liability aspects of your case. You can import all these graphics into the brief itself in Microsoft Word, or any other writing program. This is more effective than placing them at the end, although you might want to consider also having full 8 ½ x 11-inch copies of any graphic for better viewing attached to the end as well.

You should also consider making an "interactive brief," which is easier than it sounds and allows a viewer on a computer to click on any hyperlink and see the referenced document on their computer. To do this you first scan into PDF all the relevant documents such as depositions, photographs, contracts or whatever, and then in Microsoft Word, you can place "hyperlinks" to documents. You then digitally deliver opposing counsel the Word document and all the PDFs, and they can then click through to any relevant document you have hyperlinked. This shows opposing counsel that you have completely organized your case, know it inside and out, and have proof for every claim. This format is much easier to copy for distribution to many decision-makers than a 500-1000 page document with all these exhibits.

Also consider an interactive timeline that can be created in PDF format and visually allows a reader to see how the chronology of events unfolds with inclusion of all relevant documents (such as medical records, police reports or any other document). Allowing the reader to go back and forth in the chronology of events can visually bring the case to life.

Conclusion

The use of graphics, video, animations, PowerPoint and other technology is literally limitless in mediation. While an attorney never wants to be guilty of presenting flash over substance, there is really no downside to putting this much time and effort into treating a mediation like a trial. If you settle, the effort likely increased the value of the case; if you do not settle, you're really ready to try the case. Either way, you and your client win.


Smith

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Endnotes

[1] Approximately 7.4 million civil claims were filed in general jurisdiction and unified jurisdiction courts in 2005. Of those cases filed in 2005, only 27,000 were tried with the rest being settled or dismissed. See LaFountain, R., Schauffler, R., Strickland, S., Raftery, W., & Bromage, C. *Examining the Work of State Courts, 2006: A National Perspective from the Court Statistics Project* (National Center for State Courts 2007)

[2] See Hehman, H. *Findings of the Study of California Class Action Litigation 2000-2006* (Administrative Office of the Court 2009)

[3] Kaplan, T. *"Courtrooms now aglow with high-tech methods for telling better visual tale"* (San Jose Mercury News, April 29, 2011.)

[4] Keep in mind that one of the most powerful chronologies that works extremely well is an interactive PDF timeline of medical history that includes all the relevant treatment and supporting documents in order and randomly accessible for viewing. Nothing proves the continuity of treatment or claims better than such a document.